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## **A Social Scientist's View of *Gault* and a Plea for the Experimenting Society\***

by Vaughn Stapleton

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In handing down its decision in *In Re Gault*,<sup>1</sup> the Supreme Court extended to youths accused of delinquent acts certain constitutional rights heretofore reserved for adults in criminal proceedings, i.e., the right against self-incrimination and the rights to timely notice of charges, counsel and confrontation of witnesses. In arriving at its far-reaching decision, the Court confirmed what many critics of the juvenile court movement had been saying for years: that this nation's juvenile courts are beset with serious problems in handling the task for which they were specifically created—the “non-criminal” adjudication and treatment of delinquent children.

The *Gault* opinion reveals that the majority decision was apparently founded as much on social science “fact” as it was on more fundamental principles of legal reasoning. Indeed, it is apparent that the Court was in somewhat of a dilemma in trying to prove that juvenile courts were, in fact, not fulfilling the promise of their founders. Paramount among the Court's considerations in this regard were the observations: 1) that juvenile crime has increased, not decreased, since the establishment of the juvenile justice system;<sup>2</sup> 2) that a “delinquency” label is inherently stigmatizing;<sup>3</sup> 3) that the manner in which a youth perceives the legal system has profound effects on his future development as an adult member of society<sup>4</sup> and; 4) that institutionalization, even for treatment purposes, is nonetheless involuntary deprivation of liberty.<sup>5</sup>

This article will attempt three tasks in a review of the *Gault* decision and its potential consequences for the American juvenile justice system. First, the social science materials used by the Court will be critically examined in terms of their social science relevance to the decision made. Second, the proposition will be advanced that the burden of the *Gault* decision now falls on the shoulders of defense counsel, a burden which is not unlikely to cause severe role strain. Finally, a plea will be entered for the co-operative effort of law and the social sciences in implementing truly “experimental” programs aimed at delinquency prevention.

### Crime and Recidivism Rates as Indicators of Juvenile Court Failure

In assessing the relative benefits of the juvenile justice system, the majority opinion relies heavily on a study of juvenile recidivism conducted for the President's Commission on Crime in the District of Columbia. The opinion quotes the report and states:

" 'In fiscal 1966 approximately 66 per cent of the 16- and 17-year-old juveniles referred to the court by Youth Aid Division had been before the court previously. In 1965, 56 per cent of those in the Receiving Home were repeaters. The SRI study revealed that 61 per cent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 per cent had been referred at least twice before.' . . . 'Certainly, these figures and the high crime rates among juveniles to which we have referred . . . could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders.'"<sup>6</sup>

The Court's reasoning, from a rigorous social science perspective, leaves much to be desired. In drawing the conclusion that the juvenile justice system has been ineffective in curbing rising crime rates, the Court fails to use one of social science's most powerful inferential tests: a comparable "control group"—in this instance, of delinquency cases which have been processed through some system other than the juvenile courts.<sup>7</sup> In short, it is possible to state an equally plausible relationship between crime rates and juvenile courts—that without the same system of juvenile justice, juvenile crime rates would be *even greater* than the figures cited. This example may strike some as implausible, but the logic of social inquiry views both of these statements as equally plausible or implausible until they have been rigorously tested—which, as many writers have clearly indicated, has never been done.<sup>8</sup>

A final critique of the use of recidivism statistics goes to the nature of the figures themselves. Although it is proper to infer that recidivism is high among the juveniles in the courts surveyed, we are left wondering about the population of youths processed through the courts who *never* return—certainly as important a figure for the Court's argument as the recidivism rate cited. In other words, it is possible to suggest that a substantial proportion of juveniles handled by the juvenile courts are not recidivists, a figure which could only have been obtained by looking at the *total* juvenile population over time to see how many do *not* return to the juvenile court.

### Stigmatizing Effects of a Juvenile Record

The majority opinion relies heavily on the assumption that the juvenile court experience is a "stigmatizing" one.

"[I]t is frequently said that juveniles are protected by the process from disclosure of their deviant behavior. . . . This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to

those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers."<sup>9</sup>

This charge, if true, is one of the Court's most convincing arguments for extending constitutional rights to juveniles, for if a juvenile court does indeed fail in protecting the youth from the future use of juvenile records, it may be said fairly that it has failed in one of its primary missions. The problem with the assertion of potential stigmatizing effects, however, is that it is based more on common sense than on hard fact. To the best of my knowledge, only one rigorous study has ever been made on the potential stigmatizing effects of criminal sanctions,<sup>10</sup> and none has been done in the juvenile justice field. But even granting the Court's assumption that juvenile records are used and that they harm the youth in subsequent years, wouldn't it be better to impose more effective safeguards on the confidentiality of the records than to reform the whole adjudicative process? Rigid restrictions on the use of juvenile records and provisions for their expungement would seem to go a long way toward obviating the severity of the Court's charges in this regard.

Moreover, records are kept on almost all critical areas of a person's life—even on the status and condition of the family at any given point in time.<sup>11</sup> The critique leveled at the juvenile courts by the Supreme Court, then, extends equally to education, credit, security, army and IRS files. It would appear, then, that it is not the record *per se* which constitutes the core of the problem; rather, it is the illegitimate (and legitimate) use of all such records. If this is indeed the real issue, it does little good to damn juvenile courts for what is a more general problem in any modern record-keeping society.

### The Juvenile Court's Effect on Youthful Offenders

In assessing the impact of traditional juvenile court procedures on juveniles, the majority opinion sharply criticizes the presumed benefits to the juvenile of the informality of the proceedings.

" . . . [R]ecent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—*may* be a more impressive and more therapeutic attitude so far as the juvenile is concerned . . . [W]hen the procedural laxness of the 'parens patriae' attitude is followed by stern disciplining, the contrast *may* have an adverse effect upon the child, who feels that he has been deceived or enticed. . . . Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."<sup>12</sup> (Emphasis added)

In drawing these conclusions, the Court relies heavily on a small booklet entitled *Juvenile Delinquency: Its Prevention and Control*.<sup>13</sup> In fact, the Court cites it several times in making statements about the probable effects of the juvenile justice system on juveniles. This booklet, however, is not, and does not purport to be, a report of actual findings. Rather, the authors, sociologists Wheeler and Cottrell of the Russell Sage Foundation, are careful to point out that their report was designed to provide "... a brief overview of major problems, issues, and developments in the field of juvenile delinquency in the United States."<sup>14</sup> Indeed, recent studies on the attitudes of youthful offenders suggest that for many there is little understanding of the system and consequently little perception of an "unfairness."<sup>15</sup> Furthermore, there is as yet unreleased data from an experimental study of two juvenile courts in two cities, one "traditional" and one "legalistic" in procedural form, which clearly indicate that overall, relatively few of the juveniles processed through either system regard the system as "unjust."<sup>16</sup>

In this study, another part of which is described later in this article, youths were assigned at random to project attorneys who had substantially lower case-loads than the normal legal aid attorney. Of the two juvenile courts, Zenith's was by far the more "legalistic," relying on the bifurcated hearing, the presence of a state's attorney and generally more formalized procedures. These elements were lacking in Gotham's juvenile court, which was classified as "traditionalistic." As Table I indicates, the data for these two cities is quite clearly in accord with data provided by other studies.

**Table I**

Zenith: Of boys using unfavorable words, (N=273) the percentage of words indicating:

	Project Attorney (N=95)	All Other Cases (N=178)
1. Sense of <i>injustice</i>	5.4	7.9
2. No sense of injustice	94.6	92.1

Gotham: (N=185)

	(N=71)	(N=114)
1. Sense of <i>injustice</i>	8.5	7.9
2. No sense of injustice	91.5	92.1

In sum, therefore, the Supreme Court's analysis of material bearing on this problem rested heavily on intelligent guesswork rather than on hard empirical testing.

## Institutionalization as Involuntary Loss of Liberty

In its final major justification of the extension of constitutional rights to minors, the Court comments on the punitive nature of the institutionalization process.

"The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-washed walls, regimented routine and institutional laws. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide."<sup>17</sup>

This is, indeed, a most damning statement, for it strikes right at the heart of the traditional view that the juvenile justice process can be humane and rehabilitative. Moreover, its importance to the decision is underscored by the fact that *Gault* applies only in cases of possible incarceration.<sup>18</sup>

But a look at the relevant data calls the truth of this statement into question. Recent research by Margaret Q. Warren in California indicates quite clearly that for certain types of youths (diagnosed by "maturity levels" of emotional development), institutionalization offers a more favorable prognosis than release into the community.<sup>19</sup> The lack of faith in "rehabilitative" programs is classically justified by their failure to show any positive treatment effect. But as Margaret Warren's study shows, this failure may be more properly attributed to inadequate research methodologies. Moreover, carefully run experimental programs which attempt to maximize treatment—holding aside, for the moment, the question of control groups—do show positive treatment results.<sup>20</sup>

In addition, the popularly held belief that the home environment is necessarily better than the institution is not justified either. The large number of neglect and "battered child" cases heard in this country makes it doubtful that the time-honored adage is as correct as it is thought to be. Here again, institutionalization has a benefit which should have been considered by the Court in *Gault*.

## The *Gault* Decision and the Lawyer's Dilemma

However unwarranted the reliance on social science reasoning might have been in the majority opinion, it is obvious that *Gault* is now the law of the land, and when it is fully implemented in this nation's various juvenile courts,<sup>21</sup> much of the burden of the constitutional protections will fall squarely on the shoulders of defense counsel.

In addressing itself to the role of lawyers in delinquency hearings, the Court stated, "... recognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed, it seems that counsel can play an important role in the process of rehabilitation."<sup>22</sup>

These references to the potential role of defense counsel are underscored by an earlier statement of the National Council on Crime and Delinquency, which suggested a role for defense counsel in delinquency cases.

"Does the lawyer in juvenile court have an additional duty to present facts coming to his attention which may lead to an adjudication of delinquency or neglect or a supervisory order? Disclosure [to the court] of facts pointing to the need for treatment may be viewed as consistent with the child's ultimate interest, and should be presented to him and his parents. This disclosure may be viewed as a fulfillment of the duty the attorney must assume, as an officer of the court, in any proceeding involving more than merely private interests, to the court and the community as well as to his client."<sup>23</sup>

What then, beyond insuring basic procedural rights, should the duty of the defense counsel to his youthful client be—especially in those cases where it is apparent (at least superficially) that the client would probably benefit from a court-imposed treatment program? The answer is at best cloudy, and it becomes even more obscure if hard data are taken into consideration in the attempt to resolve the dilemma.

### Relevant Data Considered

In a major experimental effort to determine precisely what the impact of law counsel would be on juvenile court procedure, lawyers were introduced into several selected juvenile courts from 1966 to 1968.<sup>24</sup> Data reported in this article reflect the findings from only one of the participating cities, code-named Zenith. It is to be noted, in reference to Table II, that when project attorneys (lawyers specially picked and trained in juvenile court procedure) were introduced during the course of the project, there was a dramatic and marked shift to what might be considered more "lenient" dispositions. Not only were outright dismissals increased (over all other cases by about 14 per cent), but the ratio of continuances without findings<sup>25</sup> jumped by 8.5 per cent. All this, of course, points to a dramatic reduction of cases in which the court chose to impose official jurisdiction, either by some form of probation or by commitment proceedings against the accused youth.

**Table II**

Outcomes of Delinquency Cases in Zenith—Project Lawyers Compared to All Other Cases—both represented and unrepresented<sup>d</sup>

	Project Cases %	All Other Cases %
Petition Dismissed	54.2 (116)	40.3 (169)
Delinquency not formally entered—case continued under court supervision without finding.	12.6 (27)	4.1 (17)
Probation	26.2 (56)	43.4 (182)
Commitment	7.0 (15)	12.2 (51)
	100.0 (214)	100.0 (410)

All this should not be especially surprising to the practiced and hardened professional trial attorney. After all, lawyers are supposed to make a difference in the outcomes of cases, and if that difference lies in the direction of a greater number of dismissals, then it is in full accord with the American system of justice, which claims the presumption of innocence for all those against whom the state cannot produce sufficient evidence to prove guilt.

Nevertheless, the juvenile court project has turned up troublesome information which may lead to disquieting fears that the truth of the foregoing proposition is not as self-evident as it might first appear. As an integral part of the project, the lawyers were asked to fill out detailed reports on their cases, including information relevant to the theory and manner of defense (if any), the attitudes of the court towards their performance and—especially relevant to the present discussion—a statement of the youth's admission or denial of the offense. This last bit of information was later correlated with the actual performance of the lawyer in the courtroom in the entering of an admission or a denial.

Of the 214 cases actually represented during the time of the project, 188 usable case reports were turned in and coded for relevant research information. Table III reveals some startling figures: in a full 10 per cent (19) of the cases in which the client admitted full involvement in the delinquent act to his lawyer, a denial was entered in court, with a success ratio (counted as dismissals) of 68 per cent. Another five cases in which the juvenile admitted partial involvement to his lawyer and subsequently entered a denial in court were dismissed. In sum, therefore, it may be said

Table III

Relationship Between Plea and Disposition of Case

	Lawyer & Youth Agree on Ad- mission %	Youth Admits Lawyer Denies %	Youth & Lawyer Agree on Denial %	Youth Admits to Part of Offense, Lawyer Admits %	Youth Admits to Part of Offense Lawyer Denies %	Totals
Case Dismissed	15.8 (9)	68.4 (13)	79.0 (79)	(1)	(5)	55.9 (107)
Delinquency not formally entered—case continued under court supervision for limited time.	32.6 (18)	10.5 (2)	2.0 (2)	(2)		12.7 (24)
Probation	42.8 (26)	15.8 (3)	14.0 (14)	(4)		25.0 (47)
Commitment	7.0 (4)	5.3 (1)	5.0 (5)			5.3 (10)
	100.0 (57)	100.0 (19)	100.0 (100)	(7)	(5)	100.0 (188)

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that in a full 12.6 per cent of those cases where guilt was admitted and known to the lawyer, a not-guilty plea was entered. And when we note how many of these cases resulted in dismissal, we find that there is a 75 per cent "win" ratio (18/24).

We cannot report, of course, on the number of "innocent" victims who might have been adjudicated guilty had the lawyers not participated in the defense of the case. This is a matter that must be left to pure speculation. It would appear, however, that one of the worst fears of juvenile court traditionalists has been justified: the appearance of adversary-minded defense counsel at delinquency hearings results in the freeing into society of unrepentant and unregenerated youth. It might be argued in rebuttal that if the offenses committed were minor in nature or the youths of tender years, then the attitude of the lawyer in defense might be justified "in the benign light of traditional juvenile court philosophy." A profile of Zenith's 19 cases of full denial in the face of the youth's full admission sheds considerable doubt on this hypothesis. Only two of these cases could be considered in the younger, 10-12 age range, while the majority fell in the 13-14 area. Neither were the offenses committed either "minor" or "juvenile" in nature; all would have been classified as felonies if the offender had been an adult. Of the nineteen, we recorded three as "crimes against persons" (15.8 per cent), seven as possession of a deadly weapon (36.8 per cent), eight as "crimes against property" (42.1 per cent), and a final case was logged as "possession of marijuana." Nor, apparently, can these youths be excuplated by virtue of spotless records:

less than half (42.1 per cent) had no prior record of any kind; while five (26.3 per cent) had prior police records, three (15.8 per cent) were currently on probation, and an equal number had prior juvenile court records but were not on probation at the time the petition was filed.

The power of the project attorney to take advantage of the adversary system is apparent from the disposition of these nineteen cases. The state was unable to prove its charge in six cases, and four cases were dismissed due to the failure of necessary witnesses to show at the adjudicatory hearing. Moreover, the state chose not to prosecute in three of the cases. Only one of the youths was committed and three placed on probation, while the remaining two were given the relatively light judicial notice of a continuance without finding.

In presenting "every defense that the law of the land permits,"<sup>26</sup> Zenith's attorneys were clearly well within the bounds of the Canons of Professional Ethics as applied to criminal proceedings. But can it be argued that these Canons of Ethics extend equally to juvenile cases? After all, even *Gault* limited its holdings to only those cases where incarceration was likely, and it is a time-honored argument that youths are by definition only partially socialized human beings in terms of their rights of citizenship. Moreover, does not the defense attorney have some obligation to the broader issues of public safety and the protection of the social order by helping to apprehend and remove from society those who are a menace to it?<sup>27</sup>

These issues can easily be answered by the criminal trial lawyer, whose professional job it is to uphold the normative ethic of the protection of the individual against the immense coercive power of the state.<sup>28</sup> Given this ethic, Zenith's attorneys can find no fault with their behavior—but, as illustrated by the following case, it may be argued that there is a higher good to be served than the unrestricted use of the adversary system.

C.W., for example, was a thirteen-year-old with a prior station-house record of eighteen arrests for curfew and burglary and two prior court referrals for burglary, for which he was on probation at the time of an additional filing for burglary. Between the time of intake and the initial adjudicatory hearing, C.W. was arrested again for criminal trespass to a vehicle. In presenting C.W.'s case, the defense counsel was able to persuade the prosecutor that the state did not have sufficient evidence to uphold the second charge. The initial petition was also dismissed, much to the probation officers' dismay, through the use of a legal technicality: the complaining witness was an invalid and, being housebound, could not appear in court to testify to the allegation of burglary from her home.

It is clear that Zenith's defense attorney was quite successful in obtaining the most favorable disposition of the case, a complete dismissal on the grounds that the state was either unwilling or unable to prosecute the charges. Defense counsel's "success" was in keeping C.W. from being committed (in all probability) to the "care and custody" of the State Youth Commission. In doing so, he was also clearly acting on the wishes of C.W. and his mother, who were apparently quite adamant in not wanting C.W. to receive such a disposition. The full moral dilemma facing counsel, however, is revealed in the following data from the case report.

"It might also be added that the comfortable bromide, in these circumstances, home is as good as anything, may not be acceptable either. There seems no real question that Mrs. W. is an alcoholic, and that the home circumstances are very close to intolerable. None of the children go to school, because Mrs. W. is now living with a sister of hers and does not want to enroll the children and then have them transferred. At the same time, she has been with this sister for some six to eight months, and according to the probation officer, has taken no steps towards moving, however often she asserts that she intends to do so in the near future. It is his belief that she really has no plans for moving in the near future, and that as a result, the children are not going to go to school in the near future. The apartment in which they are living is very badly overcrowded, and the living conditions are pretty close to impossible.

"One may further ask whether or not the simple fact that C. went to school would be meaningful. He claims physical distress while attending classes including ringing in his ears, and there is every reason to believe that he is subject to some rather vicious teasing because of the scar on his head. Further, his I.Q. is right around the mental retardation level, and his performance is severely handicapped by his emotional difficulties. To the best of my knowledge there is no institution within the control of the Board of Education which is suited to a boy with his difficulties, and, as observed above, it does not seem that there is any institution in the State which is suited, as a practical matter, to his needs."

I submit that the case of C.W., although extreme in its implications and dimensions, is not altogether unusual when an essentially adversarial stance is taken in the juvenile courtroom and when, consequently, it is assumed that there are no reconcilable interests between the state and the accused delinquent.

The decision in *Gault*, therefore, contributes little to the reconciliation of the traditional juvenile court ideals with the norms of due process. Rather, it shifts the burden of the application of these norms from the judge, who used to face the juvenile alone, to an arena in which defense counsel is pitted against the state (and there is growing pressure for the state to be represented by a prosecutor). It is this shift, we submit, that places an unconscionable dual role on the attorney. For in the many cases in which he is certain of his client's complicity, either through admission or the marshalling of facts, he must make the sometimes critical decision of what to plead upon entering the courtroom, a decision which places upon him the strain of being both judge and defense counsel.

It is granted, once again, that this double role is not a problem for the criminal process; the norms of "treatment" and "rehabilitation" are the problems and goals of constructive penology, not of the adjudicative process. It is to be remembered, however, that the original purpose and function of the juvenile court was to provide rehabilitative services without the stigmatizing effects of a criminal record. It is also a time-honored truism that youth is, by its very nature, maleable. Obviously, one of the primary functions of society is the socialization of youth into the mores of the parent culture. When the primary agents of socialization (such as the family) break down, and when the child does not respond to the secondary agents of socialization (such as the school), doesn't an affirmative burden fall on the state to provide alternative services for the same or comparable ends?

How, then, are the seemingly contradictory goals of rehabilitation and strictly applied due process to be reconciled in the new model of the juvenile court as envisioned by *Gault*?



The answer, far from simple in its application, lies in the closer co-operation of the methodology of social science and the legal system. In this, I join others who advocate an "experimenting society" and an adversarial model of social science methodologies.<sup>29</sup> Using the case of C.W. as an example, it might have been possible to have investigated thoroughly, in a quasi-judicial manner not pertaining to the adjudication of the case, potential alternative treatment possibilities. This could have been done by C.W.'s lawyer in conjunction with a team (or opposing teams) of social scientists. If it could have been determined that there were appropriate facilities for C.W., then it might fairly be said that the lawyer would have been under some obligation to enter an admission to the court, while at the same time recommending to the court the appropriateness of such services. If no such services were available, then it would seem to be possible for the lawyer to petition the state to make them available, consistent with the principles of the juvenile court movement. This solution, however, envisions two basic elements: first, that expert testimony be sought and that it be sought from more than one source (for different experts arrive at their opinions through different methodologies); and second, that legislation be enacted which would permit an admission of guilt without the court necessarily taking official notice of the case.

Of these two elements, the second is perhaps the more easily realizable, for many juvenile courts allow either formally or informally a type of interim supervision order which does not confer the delinquency label upon the accused juvenile. After a period of time, and pending good behavior, the petition is usually marked dismissed, and the juvenile is found not delinquent. Indeed, the state juvenile court act which governs Zenith's juvenile court may be considered an exemplar of such legislation. The "continuance under supervision" portion of the act reads: "In the absence of objection made in open court by the minor, his parents, guardian, custodian or responsible relative, the court may, before proceeding to findings and adjudication, continue the hearing from time to time, allowing the minor to remain in his own home subject to such conditions as to conduct and visitation and supervision by the probation officer as the court may prescribe."

It is within the framework of such legislation that the defense attorney can operate more freely than he otherwise could if the options open to the court were merely "dismissal" and "adjudication." And in this manner, the stage is set for a more affirmative bargain which would meet the interests of both the state and the juvenile. In addition to such legislation, provision should also be made for replacing a petition of delinquency with a "Minor in Need of Supervision" or "Neglected Child" petition, both of which, again, allow the state to take formal notice of a case without finding it necessary to determine delinquency.

The first proposition, the use of social science in the diagnosis of pre-adjudicative cases, is perhaps the more difficult to either envision or put into practice. In the first place, it

will require that social scientists demand of themselves a commitment to the "experimenting society,"

"... one which vigorously tries out proposed solutions to recurrent problems, which makes hard headed multidimensional evaluations of the outcomes, and where the remedial effort seems ineffective, goes on to other possible solutions. The focus will be on reality testing and persistence in seeking solutions to problems. The justifications of new programs will be in terms of the seriousness of the problem, not in the claim that we can know for certain in advance what therapy will work."<sup>30</sup>

The call for the experimenting society and for the search for alternative solutions to the problems of delinquency control has several practical ramifications, probably equally unpalatable to many lawyers and social scientists alike. What it means is that the juvenile, his evaluators and his attorney will become part of a continuing evaluational scheme which turns back on itself from time to time to take a hard-headed look at what it has done and where it is going. Thus, in a hundred cases like that of C.W., it would be possible to propose outright admission in one half the cases and an adjudication of delinquency with its probable result, commitment to the state youth authority. In the other fifty cases, C.W. would be treated under some alternative program which did not threaten the delinquency sanction. And to round out the ideal design, an additional fifty cases could be handled in the same way project attorneys handled their cases in Zenith.

The evaluation of this type of test would be able to state, on a number of indices, the substantive benefits—or lack of benefits—of any or all of the programs. Thus, if it could be shown that type-two treatment (without finding of delinquency) produced the lowest rate of recidivism and the greatest degree of emotional adjustment after a year's time, while the other two alternatives produced dramatically opposite effects, then it could be affirmatively demonstrated that this was the preferred path.

Unfortunately, social science findings are rarely so dramatic or clear-cut, and we, as members of the experimenting society, must be aware of, and prepared for, the necessary slippage and failure that inevitably comes with the initiation of new programs. But awareness of potential failure does not mean that we have to succumb to ultimate despair. After all, if programs are to be initiated on the basis of pure guesswork, isn't it better to try to obtain a little more precise knowledge about what we are doing and where we are going?

But what of my lawyer friends who scream loudly in the background that this type of experimenting society necessarily deprives certain juveniles of their constitutional rights to a fair trial? I am persuaded by their arguments only insofar as certain constitutional issues have already been decided for juveniles, such as the rights under *Gault*. But I would be even more convinced if the court had adopted Mr. Justice Black's partial concurrence, which argues that the right of juveniles to due process guarantees does not rest on social science grounds.<sup>31</sup> The fact, however, that the majority opinion felt constrained to call upon social science in reaching its decision leaves me in some doubt as to whether or not it might not have been wiser to selectively test the impact of each of the guarantees before applying them wholesale to juvenile courts.

In support of this, I can think of nothing better than Mr. Justice Harlan's partial dissent in *Gault*, a dissent which, it seems to me, calls for the very "experimenting society" which this article envisions:

"[I]t should not be forgotten that juvenile crime and juvenile courts are both now under earnest study throughout the country. I very much fear that this Court, by imposing these rigid procedural requirements, *may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, and may thus now hamper enlightened development of the systems of juvenile courts.*"<sup>32</sup> (Emphasis added)

Mr. Justice Harlan's comments are strangely reminiscent of statements by those philosophers of science who have cautioned for years against prejudgment on matters of fact. Indeed, if the decision in *In Re Gault* had been made on the basis of strictly legal principles, I firmly believe that the Court would have been on less shaky ground than it is now. For having made its decision on the basis of what appears to be social science "fact," it must now face the ultimate dictum of social science, of which there is no better spokesman than Karl Popper:

"Two simple examples of methodological rules may be given. They will suffice to show that it would be hardly suitable to place inquiry into method on the same level as purely logical inquiry.

"(1) The game of science is, in principle, without end. He who decides one day that scientific statements do not call for any further test, and that they can be regarded as finally verified, retires from the game.

"(2) Once a hypothesis has been proposed and tested, and has proved its mettle, it may not be allowed to drop out without 'good reason'. A 'good reason' may be, for instance: replacement of the hypothesis by another which is better testable; or the falsification of one of the consequences of the hypothesis."<sup>33</sup>

Law is not an immutable force which resists time and tide in the face of social reality. It seems as though law and social science have a goal in common—namely, a system of justice which serves the public rather than impressing unrestricted sanctions upon it. If both the legal and the social science systems were to unbend a bit from their traditional perspectives as unilateral experts, would not we be a little better situated to meet common problems on common grounds?

1. 387 U.S. 1 (1967).

2. *Id.* at 20, n. 26, 21-22.

3. *Id.* at 23-5 and n. 31.

4. *Id.* at 26 and n. 37.

5. *Id.* at 27.

6. *Id.* at 22.

7. An explanation of a "true" field experiment is found in H. Zeisel, H. Kalven and B. Bucholz, *Delay in the Court* 241-2 (1959):

"Whenever a legal innovation is introduced, it should be done, if possible, under circumstances which will permit thorough evaluation of its effects. The popular notion of an 'experiment,' in the sense of an innovation, tentatively introduced on a limited scale, is already quite familiar to the field of judicial administration. The trouble is that these try-outs are as a rule not accompanied by control procedures that permit us to learn exactly what was and what was not achieved. Only a scientifically controlled experiment can do this.

"In principle the experiment is simple enough. The experimental treatment is applied to one group, and not applied to another, the 'control group.' The two groups are otherwise kept as much alike as possible, so that any effect appearing in the experimental group can unequivocally be attributed to the deliberate experimental variation. . . . Comparability of experimental group and control group as a scientific experiment is achieved by leaving it to chance, that is to a lottery process, which units ought to go into the experimental and which units into the control group."

See also N. Morris, *Book Review*, 66 Yale L. J. 962-72 (1957), and R. D. Schwartz and S. Orleans, *On Legal Sanctions*, 34 U. of Chi. L. Rev. 274 (1967).

8. See especially H. W. Dunham, *The Juvenile Court: Contradictory Orientation in Processing Offenders*, in *Juvenile Delinquency: A Book of Readings* 337, 352-354 (R. Giallombardo, ed. 1966).

9. 387 U.S. at 24.

10. R. D. Schwartz and J. H. Skolnick, *Two Studies of Legal Stigma*, 10 Social Problems 133 (1962).

11. See *On Record: The Use of Dossiers in American Life* (S. Wheeler, ed. 1969).

12. 387 U.S. 1 at 26.

13. S. Wheeler and L. Cottrell, *Juvenile Delinquency: Its Prevention and Control* (1966).

14. S. Wheeler (ed.), *supra* note 11.

15. See M. Baum and S. Wheeler, *Becoming an Inmate*, in *Controlling Delinquents* 153, 165 (S. Wheeler, ed. 1968). They state:

"The bulk of the youths accepted their commitment as fair. . . . Save for those whose first reaction was one of indignation, they did not, by and large, deny the rightness or justness of the system. This seems very important, for it means that despite their haziness about the court proceeding, despite the fact that they have been told, oftentimes various and conflicting things about what is happening to them, despite their shock and unhappiness at a commitment, they still largely accord legitimacy to the decision, and by doing so, to the decision-making apparatus of the courts."

16. See N. Lefstein and V. Stapleton, *Counsel in Juvenile Courts: An Experimental Study*, National Council of Juvenile Court Judges, Chicago, Illinois (1967).

17. 387 U.S. 1 at 27.

18. "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect to *proceedings to determine delinquency which may result in commitment to an institution* in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." 387 U.S. 1 at 41. (Emphasis added)

19. M. Q. Warren, *The Community Treatment Project* in *The Sociology of Punishment and Correction* 671 (N. Johnston et al., ed. 1970).

20. See especially S. Adams, *The PICO Project* and W. C. Bailey, *An Evaluation of 100 Studies of Correctional Outcomes*, in *The Sociology of Punishment and Correction* 548, 733 (N. Johnston et al., ed. 1970).

21. It would appear, however, that a rapid change toward implementing *Gault* is not to be expected for some time, especially in "traditional" juvenile courts. See N. Lefstein, V. Stapleton and L. Teitelbaum, *In Search of Juvenile Justice: Gault and its Implementation*, 3 Law and Society Review 491 (1969).

22. 387 U.S. 1 at 38, n. 64.

23. National Council on Crime and Delinquency, Advisory Counsel of Judges, *Procedure and Evidence in the Juvenile Courts* 43 (1962).

24. *Supra* note 16.

25. A continuance without finding is tantamount to a dismissal at a later date pending the juvenile's continued good behavior.

26. American Bar Association, *Canons of Professional Ethics*, Canon 5.

27. See especially F. Allen, *The Juvenile Court and the Limits of Juvenile Justice*, in *Juvenile Delinquency: A Book of Readings* 389 (R. Giallombardo, ed. 1966).

28. See especially J. Griffiths, *Ideology in Criminal Procedure, or A Third Model of the Criminal Process*, 79 Yale L. J. 359 (1970).

29. D. T. Campbell, *Reform as Experiment*, 24 American Psychologist 409 (1969).

30. D. T. Campbell, *Application for a Grant to Support Research on Methods for the Experimenting Society*, Russell Sage Foundation (unpublished m.s. 1970).

31. 387 U.S. 1 at 59 ff.

32. *Id.* at 77.

33. K. R. Popper, *The Logic of Scientific Discovery* 53-4 (1961).